85-946

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

KERR-MCGEE CORPORATION,
a Delaware Corporation, and
KERR-MCGEE NUCLEAR CORPORATION,
a Delaware Corporation,
Petitioners,

v.

BILL M. SILKWOOD, Administrator of the Estate of
Karen G. Silkwood, deceased,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Rule 404(b) of the Federal Rules of Evidence and principles of due process permit entry of a punitive damages judgment based solely on evidence of a defendant's prior acts that were not shown to have caused the injury at issue.

2. Whether, in a diversity action, dispositive questions of state law that have not previously been addressed by the courts of that state and that implicate important state policies should be certified to the state's highest court.

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v.

BILL M. SILKWOOD, Administrator of the Estate of
Karen G. Silkwood, deceased,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Kerr-McGee Corporation and Kerr-McGee Nuclear Corporation petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals following remand from this Court, App. A, *infra*, 1a-39a, is reported at 769 F.2d 1451. This Court's prior opinion in this case, App. B, *infra*, 40a-90a, is reported at 464 U.S. 238. The

initial opinion of the court of appeals, App. C, *infra*, 91a-130a, is reported at 667 F.2d 963. The decision of the district court, App. D, *infra*, 131a-218a, is reported at 485 F. Supp. 566.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1985. Petitions for rehearing were denied on September 25, 1985. App. E, *infra*, 219a-220a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED

1. The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

2. Rule 404(b) of the Federal Rules of Evidence provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

3. The Uniform Certification of Questions of Law Act, Okla. Stat. Tit. 20, § 1602 (Supp. 1984-1985) provides in pertinent part:

> The Supreme Court [of Oklahoma] . . . may answer questions of law certified to it by . . . a Court of Appeals of the United States . . . when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling

precedent in the decisions of the Supreme Court or Court of Criminal Appeals of this state.

STATEMENT OF THE CASE

1. Respondent, as administrator of the estate of Karen G. Silkwood, brought this federal diversity action against petitioners Kerr-McGee Corporation and Kerr-McGee Nuclear Corporation ("Kerr-McGee"), seeking recovery for personal injuries and property damage allegedly suffered by Ms. Silkwood as a result of plutonium contamination. The action was based on common-law tort principles under Oklahoma law.

The evidence showed that Karen Silkwood was a laboratory analyst for Kerr-McGee at its Cimmaron plutonium fabrication facility near Crescent, Oklahoma. On November 5, 6 and 7, 1974, Ms. Silkwood was found to have been contaminated with plutonium. The initial contamination on November 5 was detected through routine monitoring at the Kerr-McGee facility. At that time, Ms. Silkwood was immediately decontaminated and no further contamination was detected. However, she was given urine and fecal kits and was instructed to collect samples in order to check for plutonium discharge.

On the morning of November 7, 1974, Karen Silkwood's apartment became contaminated with a small amount of plutonium (less than .0003 grams). As the court of appeals later found, App. C, *infra*, 104a:

> [T]he only reasonable inference that can be drawn from the circumstantial evidence is that the contamination of the apartment . . . resulted from Silkwood's preparation that morning of [a] urine sample. It is undisputed that the urine sample was spiked, although it is not known who spiked it . . . .[1]

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[1] The urine sample contained insoluble plutonium that could not have been excreted naturally from the body. App. C, *infra*, 95a. The plutonium must have been added to the sample.

There was also undisputed evidence that urine samples that Silkwood had previously prepared at her apartment had been "spiked" with plutonium. Kerr-McGee did not receive the laboratory reports on these earlier samples until November 13, 1974.[2]

According to the court of appeals, there was circumstantial evidence that would have supported the conclusion that Karen Silkwood spiked her own urine samples. App. C, *infra*, 98a. The jury, however, did not so conclude. *Id.* Both the district court and the court of appeals concluded that there was no evidence that would have supported a finding that anyone acting on behalf of Kerr-McGee had spiked Ms. Silkwood's urine samples. *Id.* No other evidence was presented concerning the cause of the contamination of Ms. Silkwood's apartment. Indeed, respondent's counsel emphasized to the jury: "I don't know how Karen Silkwood got contaminated . . . . We don't have to explain how it got from the plant to her apartment—and I am glad of that . . . because I don't know how, I couldn't tell you, and if I tried to tell you, it would just be speculation." Record, Vol. XI at 553, 555-556.[3]

As noted, there was no evidence that any misconduct by Kerr-McGee caused Karen Silkwood's urine sample to be spiked with plutonium. The only evidence of alleged misconduct by Kerr-McGee concerned prior acts that could not possibly have caused the contamination of Karen Silkwood's apartment. Kerr-McGee repeatedly objected to the introduction of evidence concerning prior acts of alleged misconduct unrelated to the contamination of Silkwood's apartment *See, e.g.*, Tr. 561-563, 1056-1062, 1776-1781.

At the conclusion of the trial, the jury awarded respondent $500,000 on the personal injury claim, $5,000

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[2] *See* A. 907, Tr. 539-542, 3921, 4608.

[3] Respondent's counsel made this point repeatedly. *See, e.g.*, Tr. 10,562; App. Vol. III 902; Tr. 3,443, 9,975, 10,570.

on the property damage claim (based on the stipulated value of the personal property in the apartment that had been contaminated by the spilled urine sample), and $10,000,000 in punitive damages. The district court entered judgment against petitioners in those amounts.[4]

2. On petitioners' appeal, the court of appeals affirmed in part and reversed in part. App. C, *infra*, 91a-130a. The court reversed the $500,000 personal injury judgment on the ground that recovery for those injuries was controlled exclusively by the Oklahoma Workers' Compensation Act, Okla. Stat. Tit. 85 (1970). *Id.* at 98a-108a. The court affirmed the judgment awarding $5,000 for property damage under a theory of strict liability—*i.e.*, liability without fault. *Id.* at 108a-111a. Finally, the court reversed the judgment awarding punitive damages, holding that, in light of the extensive federal statutory scheme regulating the Kerr-McGee facility, imposition of punitive damages under state law was barred by federal preemption principles. *Id.* at 111a-114a.

3. Respondent sought review of the preemption question in this Court. This Court reversed, holding that the award of punitive damages was not preempted by fed-

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[4] The district court denied Kerr-McGee's post-trial motions. App. D, *infra*, 131a-218a. The court rejected petitioners' contentions that respondent's claims were precluded by the Oklahoma Workers' Compensation law and by the preemption doctrine. *Id.* at 135a-146a, 168a-171a. The court also rejected the argument that liability, including liability for punitive damages, was barred by Kerr-McGee's substantial compliance with applicable federal regulations. *Id.* at 146a-168a. In addition, the court refused to set aside the punitive damages judgment on the ground that there was no evidence of any act by Kerr-McGee toward Ms. Silkwood that could be characterized as reckless, wanton or malicious. *Id.* at 172a-174a. In this connection, the court relied on evidence of Kerr-McGee's alleged prior acts that were unrelated to the contamination of Silkwood's apartment and rejected the argument that such evidence could not be used to support an inference of subsequent misconduct in connection with the contamination of the apartment. *Id.* at 176a, 180a-181a.

eral law. App. B, *infra*, 40a-90a. The Court remanded the case to the court of appeals for further proceedings, noting (*id.* at 59a) that

> [o]n remand Kerr-McGee is free to reassert any claims it made before the Court of Appeals which were not addressed by that court or by this opinion, including its contention that the jury's findings with respect to punitive damages were not supported by sufficient evidence and its argument that the amount of the punitive damages award was excessive.

In a dissenting opinion Justice Powell, joined by the Chief Justice and Justice Blackmun, pointed out that "there was no evidence showing a direct causal connection between any Kerr-McGee neglect and Silkwood's minor contamination," and that there was no "evidence whatever of . . . 'oppression,' 'fraud,' 'malice,' or 'wanton reckless[ness]' "—the prerequisites under Oklahoma law for an award of punitive damages. *Id.* at 80a, 87a.[5]

4. On remand, the court of appeals concluded that Kerr-McGee was not entitled to judgment *non obstante verdicto* on the question of punitive damages. App. A, *infra*, 1a-39a. The court acknowledged that there was no direct evidence that any misconduct by Kerr-McGee caused the contamination of Karen Silkwood's apartment. *Id.* at 8a. But the court held that it was permissible for the jury to "infer" that the contamination of the apartment could have been caused by Kerr-McGee's gross negligence, based on evidence about alleged prior acts relating to "plant security, worker training, management, radiation detection, medical evaluation, . . . contamination incidents . . . lackadaisical attitude . . . disregard for employee safety . . . endangerment to the public . . . [and Kerr-McGee's inability] to account for as much as 10.4 kilograms of plutonium."[6] *Id.* at 7a-8a.

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[5] This question was not addressed by the majority opinion.

[6] All of the evidence concerning Kerr-McGee's alleged misconduct was vigorously disputed. The AEC—which conducted a thorough in-

In refusing to enter judgment in favor of Kerr-McGee on the punitive damages claim, the court of appeals on remand also decided two important questions of Oklahoma law that it acknowledged had never previously been addressed by an Oklahoma court. First, the court recognized a cause of action for punitive damages under Oklahoma law based on property damage incurred incident to a job-related personal injury. App. A, *infra*, 12a-13a. Second, the court ruled that substantial compliance with a regulatory scheme does not preclude an award of punitive damages under Oklahoma law. *Id.* at 11a-12a.

Finally, the court of appeals concluded that the case should be remanded for a new trial on the punitive damages issue because Kerr-McGee had been unfairly prejudiced by the introduction of evidence relating to Karen Silkwood's personal injuries—injuries for which recovery was barred by the Oklahoma Workers' Compensation Act. App. A, *infra*, 13a-19a.[7]

5. Kerr-McGee sought rehearing before the court of appeals. In its petition for rehearing, Kerr-McGee requested the court of appeals to certify to the Supreme Court of Oklahoma the important state law questions that the court had passed upon in refusing to enter judgment for Kerr-McGee on the punitive damages

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vestigation of all of these allegations—concluded that Kerr-McGee had substantially complied with all applicable regulations and had conducted its operations at the Cimarron plutonium facility in a safe manner. App. B, *infra*, 44a, 80a-81a.

[7] The court of appeals did not directly address Kerr-McGee's claims concerning the erroneous evidentiary rulings of the district court. It stated, however, that only evidence that relates to the escape of plutonium from the facility into Karen Silkwood's apartment may be admitted at the new trial. App. A, *infra*, 19a. Since respondent has conceded that he cannot prove how the plutonium escaped—and therefore *a fortiori* that he cannot prove that the escape was Kerr-McGee's fault—the court should have set aside the punitive damages award.

issue.[8] The court of appeals denied that request summarily. App. E, *infra*, 219a-220a.

REASONS FOR GRANTING THE PETITION

This case presents an important question under the Federal Rules of Evidence that implicates fundamental principles of due process. It also raises a major question about the proper role of a federal court faced with unsettled questions of state law that have an important bearing on significant state policies.

The court of appeals held that evidence of unrelated prior acts and an allegedly "lackadaisical attitude" was sufficient to prove that the contamination of Karen Silkwood's apartment was the result of malice that could be inferred from Kerr-McGee's alleged gross negligence, even though there concededly was no evidence that Kerr-McGee's conduct had anything to do with the contamination of Silkwood's apartment. That holding is flatly inconsistent with decisions of other courts of appeals applying Rule 404(b) of the Federal Rules of Evidence and with elementary notions of fairness embodied in the Due Process Clause. The court of appeals also ignored basic principles of comity and federalism by deciding questions of state law that should have been submitted in the first instance to the Supreme Court of Oklahoma.

These questions are of substantial importance to the administration of justice. Federal courts frequently are called upon to decide questions about the admissibility of evidence relating to the prior acts of a defendant. Moreover, as this case demonstrates, serious due process concerns are raised by a ruling permitting such evidence to serve as the sole basis for a finding of liability. Unless the decision of the court of appeals is overturned, defendants in cases brought within the Tenth Circuit

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[8] This request for certification was in accordance with the Uniform Certification of Questions of Law Act, Okla. Stat. Tit. 20, §§ 1601-12 (Supp. 1984-1985).

face the possibility of being found liable on the basis of evidence concerning prior, unrelated acts of misconduct.

Furthermore, federal courts in diversity cases are often required to address unsettled questions of state law. When this situation arises, state courts should have the opportunity to decide the state law questions, particularly when important state policies are implicated. The failure by federal courts to defer to the state courts concerning unsettled questions of state law is likely to cause unnecessary damage to the delicate fabric of our federal system.

Given the frequency with which the questions presented are likely to recur, review by this Court is necessary to provide guidance to the lower courts.[9]

I. The Federal Rules Of Evidence And Related Due Process Principles Prohibit Basing A Determination Of Malice Necessary To Support A Punitive Damages Judgment On Evidence Of Unrelated Prior Acts

A. As the court of appeals recognized, the award of punitive damages in this case should have been set aside under Oklahoma law requiring a showing of malice unless there was sufficient evidence that "gross negligence on the part of Kerr-McGee caused damage to Ms. Silkwood's property." App. A, *infra*, 7a. The court acknowledged that there was "no direct evidence" that the contamination of Karen Silkwood's apartment was caused

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[9] We recognize that this Court infrequently grants review of judgments remanding a case for a new trial. This case, however, warrants departure from the Court's general practice because it presents clear-cut questions of law that are "fundamental to the further conduct of the case." *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945). Moreover, in view of the clearly erroneous nature of the court of appeals' rulings, this Court may wish to consider disposing of this case summarily, either by reversing the judgment of the court of appeals, or by vacating the judgment of that court to permit certification of the state law questions to the Oklahoma Supreme Court.

by misconduct on the part of Kerr-McGee. *Id.* at 8a.[10] All of the evidence concerning Kerr-McGee's alleged misconduct concerned prior acts that were not shown to have had any causal connection to the contamination of the apartment. *Id.* at 7a.

The acknowledged absence of any evidence that the contamination was caused by any misconduct on the part of Kerr-McGee requires that the punitive damages award be set aside. Evidence of unrelated prior acts cannot justify an award of punitive damages. Rule 404(b) of the Federal Rules of Evidence states unequivocally:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.

The Rule prohibits "inferring" current misconduct based on evidence of past misconduct. Accordingly, none of the evidence concerning Kerr-McGee's alleged prior acts can be used to prove that misconduct by Kerr-McGee caused the contamination of Karen Silkwood's apartment. Since there is no evidence of misconduct except for the evidence of Kerr-McGee's prior acts, the court of appeals should have concluded that there is no basis for an award of punitive damages. Three Justices of this Court have already concluded that there is no basis "whatever" for an award of punitive damages in this case. App. B, *infra*, 87a.

The decision of the court of appeals is inconsistent with the plain language of Rule 404(b) and with numerous decisions of other circuits. *See, e.g., Garcia* v. *Aetna Casualty and Surety Co.*, 657 F.2d 652 (5th Cir. 1981) (holding that it was reversible error in an arson case to admit evidence of a prior fire on the plaintiffs' other

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[10] As pointed out above, three Justices of this Court have concluded that "there was no evidence showing a direct causal connection between any Kerr-McGee neglect and Silkwood's minor contamination." App. B, *infra*, 80a.

property); *Reyes* v. *Missouri Pacific R.R.*, 589 F.2d 791, 793-794 (5th Cir. 1979) (evidence of prior drunkenness is inadmissible to prove drunkenness on the night in question); *International Shoe Machine Corp.* v. *United Shoe Machinery Corp.*, 315 F.2d 449, 459 (1st Cir. 1963) (prior misconduct is inadmissible to prove propensity); *Smallfield* v. *Home Insurance Co. of New York*, 244 F.2d 337 (9th Cir. 1957) (evidence of prior thefts inadmissible to prove that the jewelry in question was stolen).

To be sure, evidence of prior acts may be admissible for certain limited purposes. For example, evidence of prior similar incidents may be admissible to prove that a defendant knew that there was a defect in its product that should have been corrected. *See, e.g., McKinnon* v. *Skil Corp.*, 638 F.2d 270, 277-278 (1st Cir. 1981) (only evidence of prior incidents that are shown to have occurred under substantially similar circumstances may be admitted). *Accord, Ramos* v. *Liberty Mutual Insurance Co.*, 615 F.2d 334, 338-340 (5th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); *Prashker* v. *Beech Aircraft Corp.*, 258 F.2d 602, 608-609 (3d Cir.), *cert. denied*, 358 U.S. 910 (1958); *Chesapeake & Ohio Ry.* v. *Newman*, 243 F.2d 804, 813 (6th Cir. 1957). In this case, however, there was no evidence that Kerr-McGee had knowledge of prior instances of contamination of its employees' urine samples with plutonium.[11]

While the basic principles discussed above should be clear, there is considerable confusion among the lower

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[11] The court of appeals relied on *Averitt* v. *Southland Motor Inn of Oklahoma*, 720 F.2d 1178 (10th Cir. 1983), for its conclusion that current misconduct could be inferred from past misconduct. In *Averitt*, however, there was direct evidence that the illness in question was caused by a contemporaneous violation of applicable sanitary requirements. Evidence of prior health code violations was admitted for the limited purpose of proving that the defendant had knowledge of unsanitary conditions and had failed to take appropriate corrective action.

courts about their application to specific cases. *See* 22 C. Wright & K. Graham, *Federal Practice and Procedure: Evidence* § 5239, at p. 427 (1978) (noting that most of the case law on this question is hopelessly confused). Clarification by this Court would provide much needed guidance.

B. More is at stake than a technical point of evidence. In cases such as this, where there has been an egregious abuse of Rule 404(b), the basic constitutional right of a defendant to a fair trial is implicated. Imposing punitive damages solely on the basis of prior conduct that did not cause the injury at issue should be no more permissible than imposing a prison term on a criminal defendant based solely on evidence of the defendant's prior bad acts.

While this Court has never specifically addressed the procedural protections that are constitutionally required before punitive damages may be awarded in a civil case,[12]

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[12] The Court has recognized that "the Constitution presents no general bar to the assessment of punitive damages in a civil case . . . ." *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 159 (1967). Other courts have held that punitive damages may be imposed only where there is "clear and convincing" evidence of willful and wanton conduct. *See Acosta* v. *Honda Motor Co.*, 717 F.2d 828, 829 (3d Cir. 1983); *Wangen* v. *Ford Motor Co.*, 294 N.W.2d 437 (1980); *Roginsky* v. *Richardson-Merrill, Inc.*, 378 F.2d 832 (2d Cir. 1967). A leading commentator has suggested that such a heightened standard of proof may be constitutionally required. *See* Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 U. Va. L. Rev. 269 (1983).

In other civil contexts, this Court has held that due process requires a "clear and convincing" standard of proof. *See Santosky* v. *Kramer*, 455 U.S. 745 (1982) (parental rights termination); *Addington* v. *Texas*, 441 U.S. 418 (1979) (civil commitment); *Woodby* v. *INS*, 385 U.S. 276 (1966) (deportation). In view of the penal nature of punitive damages, and the stigma that attaches to a defendant found to have engaged in willful and wanton misconduct, it seems appropriate to require a "clear and convincing" standard of proof. *See* Wheeler, *supra*, 69 U.Va. L. Rev. at 311-312.

the Court has observed that the principle barring punishment based on evidence of unrelated prior acts is one that is deeply embedded in the common law of the United States and England. Thus, in *Michelson* v. *United States*, 335 U.S. 469, 475 (1948), the Court noted that "[c]ourts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt." (footnote omitted.)

The basis for this rule is clear. Courts have recognized that evidence of prior misconduct is likely to deny a defendant "a fair opportunity to defend against a particular charge" because such evidence is highly prejudicial and may confuse the issues in the eyes of the trier of fact. *Michelson* v. *United States*, *supra*, 335 U.S. at 476. As one leading commentator has explained:

> The natural and inevitable tendency of the tribunal —whether judge or jury—is to give excessive weight to the [prior misconduct] thus exhibited and either to allow it to bear too strongly on the present charge or to take the proof of it as justifying a condemnation, irrespective of the accused's guilt of the present charge. Moreover, the use of alleged particular acts ranging over the entire period of the accused's life makes it impossible for him to be prepared to refute the charge, since any or all of such acts may be mere fabrications.

1A *Wigmore on Evidence* § 58.2, at pp. 1212-1213 (Tillers rev. 1983).

The courts have recognized that in extreme cases, the admission of evidence of prior acts may deprive a defendant of a fair trial. Thus, in *Foster* v. *Barbour*, 613 F.2d 59, 60 (4th Cir. 1980), the court held that due process was violated where the defendant had been greatly prejudiced by the introduction of evidence of unrelated prior acts.

This case does not simply involve the question whether the admission of prior act evidence was so prejudicial as to violate due process. Rather, the issue here is whether due process permits a judgment of punitive damages to be based solely on evidence of alleged prior misconduct—evidence which clearly is not admissible to establish liability. In these circumstances, the evidence on which the punitive damages judgment rested was not merely insufficient, it was nonexistent. *Cf. Thompson* v. *City of Louisville*, 362 U.S. 199 (1960). Accordingly, the court of appeals' refusal to enter judgment in favor of Kerr-McGee on the punitive damages issue was clear constitutional error warranting summary reversal.[13]

II. The Court Of Appeals Should Have Certified Unresolved Questions Of State Law To The Supreme Court Of Oklahoma

In its opinion on remand, the court of appeals decided two questions of Oklahoma law that have never been addressed by any court of that State and that are crucial to the outcome of this case. First, the court of appeals held that Oklahoma would allow an action for punitive damages in any case where property damage had been incurred in connection with a job-related injury. Second, the court of appeals held that proof of substantial compliance with a regulatory scheme would not be a defense to an action for punitive damages.

Both holdings will have a significant effect on the workers' compensation and industrial relations policies of Oklahoma. Many workers' compensation cases are

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[13] It is not necessary for the Court to decide the constitutional issue in reaching this result. Rather, the Court may exercise its supervisory power over the federal courts by holding that the court of appeals should have sustained Kerr-McGee's motion for judgment notwithstanding the verdict on the punitive damages claim because there was no evidence that Kerr-McGee caused the contamination of Silkwood's apartment. *See, e.g., Moore* v. *Chesapeake & Ohio Ry.*, 340 U.S. 573 (1951); *Pennsylvania R.R.* v. *Chamberlain*, 288 U.S. 333 (1933).

likely to involve at least some incidental property damage, such as torn clothing, shattered eyeglasses, or a dented fender.[14] According to the court of appeals, punitive damages may be recovered even when actual damages are nominal. App. A, *infra*, 16a. Thus the opinion is likely to trigger a plethora of suits by injured workers alleging minimal property damage but seeking high punitive damages. There is, at a minimum, a serious question whether that result is consistent with the intent of the Oklahoma Workers' Compensation Act. The court of appeals conceded that the Oklahoma courts have "yet to decide the question" (App. A, *infra*, 12a). Such an important question of state law should have been decided in the first instance by the Supreme Court of Oklahoma.

As the court of appeals acknowledged (App. A, *infra*, 11a), the Oklahoma Supreme Court has never decided whether substantial compliance with an applicable scheme of regulations—especially one as extensive as that governing the processing of plutonium—precludes an award of punitive damages. Decisions from other jurisdictions are divided. *Compare, e.g., Harrison* v. *Indiana Auto Shredders Co.*, 528 F.2d 1107, 1125-1126 (7th Cir. 1976) (compliance with applicable regulations precludes an award of punitive damages), *with Gryc* v. *Dayton-Hudson Corp.*, 297 N.W.2d 727, 733-735 (Minn.), *cert. denied*, 449 U.S. 921 (1980) (compliance with regulations does not preclude an award of punitive damages). *See also, e.g., Prosser & Keeton on Torts*, 233 n.41 (5th ed. 1984) ("[i]n most contexts . . . compliance with a statutory standard should bar liability for punitive dam-

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[14] *See, e.g., Atlas Rock Bit Service Co.* v. *Henshaw*, 591 P.2d 294 (Okla. 1979) (claimant suffered loss of eye plus spinal damage while working on a drilling rig); *Carroll* v. *District Court*, 579 P.2d 828 (Okla. 1978) (volunteer fireman suffered grievous injuries while pinned against burning car); *Indian Territory Illuminating Oil Co.* v. *Crow*, 147 Okla. 229, 296 P. 451 (1931) (claimant grievously injured by burning of his pants).

ages"). This important question of state policy also should have been left for the Supreme Court of Oklahoma to decide in the first instance.

As Kerr-McGee pointed out in its petition for rehearing to the court of [illegible]s, Oklahoma law provides a procedure by which [illegible]ed questions of state law may be certified from a federal court to the Oklahoma Supreme Court. *See* Uniform Certification of Questions of Law Act, Okla. Stat. Tit. 20, §§ 1601-12 (Supp. 1984-1985). That procedure has been used effectively in the past. *See, e.g., Weber* v. *Armco, Inc.*, 663 P.2d 1221 (Okla. 1983); *Thiry* v. *Armstrong World Industries*, 661 P.2d 515 (Okla. 1983).

This Court has repeatedly emphasized that federal courts should take advantage of certification procedures rather than deciding in the first instance important questions of state law that have not been resolved by state courts. The Court has noted that, in the long run, certification saves "time, energy, and resources and helps build a cooperative judicial federalism." *Lehman Brothers* v. *Schein*, 416 U.S. 386, 391 (1974).[15]

Moreover, as Justice O'Connor observed in her concurring opinion in *Brockett* v. *Spokane Arcades, Inc.*, 105 S.Ct. 2794, 2805 (1985):

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[15] Chief Justice Sheran of the Supreme Court of Minnesota has described the strains that are placed on our federal system when federal courts in diversity cases reach out to decide unsettled questions of state law:

> Diversity cases involve interpretations of state law. In our federal system, state courts are the final arbiters of state law. It is an awkward situation for federal trial judges to be interpreting state law and precedents when errors which are bound to occur cannot be corrected by the highest court of the state, the laws of which are being applied. This is particularly true where the law of torts is involved, this being an area of the law characterized by constant change and modification.

Sheran, *State Courts and Federalism in the 1980's: Comment*, 22 Wm. & Mary L. Rev. 789, 793 (1981).

> Speculation by a federal court about the meaning of a state statute in the absence of prior state adjudication is particularly gratuitous when, as is the case here, the state courts stand willing to address questions of state law on certification from a federal court.

Accord, *Toll* v. *Moreno*, 458 U.S. 1, 6-7 (1982); *Mills* v. *Rogers*, 457 U.S. 291, 306 (1982); *Zant* v. *Stephens*, 456 U.S. 410 (1982); *Lehman Brothers* v. *Schein*, *supra*; *Kaiser Steel Corp.* v. *W.S. Ranch Co.*, 391 U.S. 593 (1968) (per curiam). *Cf. Louisiana Power & Light Co.* v. *City of Thibodeaux*, 360 U.S. 25 (1959) (federal district court properly abstained from deciding important question of state law pending a ruling by state courts).[16]

The concerns articulated by Justice O'Connor in *Brockett* are fully applicable here. Accordingly, this Court should vacate the judgment below to permit the Oklahoma Supreme Court to decide the important state law questions that were improperly passed upon by the court of appeals. *Cf. United Gas Pipeline Co.* v. *Ideal Cement Co.*, 369 U.S. 134 (1962) (judgment of court of appeals vacated to permit parties to obtain construction of local law in state courts).

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[16] We note that *Lake Coal Co.* v. *Roberts & Schaefer Co.*, No. 84-1240 (argued Oct. 15, 1985), presents the related issue whether a federal court in a diversity action involving only state law questions may stay the proceedings pending resolution of those state law questions in a concurrent state court action.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be reversed summarily, and the case should be remanded to that court with directions to enter judgment in favor of petitioners on the issue of punitive damages. In the alternative, the judgment of the court of appeals should be vacated and the case should be remanded to that court with directions to certify the state law questions to the Oklahoma Supreme Court.

Respectfully submitted,

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